No. 16,483

United States Court of Appeals

for the Ninth Circuit

DR. ROBERT L. HARGRAVE,

Appellant,

vs.

E. G. WELLMAN, doing business as Wellman Enterprises,

Appellee.

BRIEF OF APPELLEE

ART JARDINE,
JOHN D. STEPHENSON,
ALEX BLEWETT, JR.,
JOHN H. WEAVER, and
GEORGE N. McCABE

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STATEMENT OF THE CASE

The factual situation in this case is rather simple, and generally appellant's statement is acceptable. Appellant controverts certain statements, which are as follows:

1. The sudden movement of the guide's horse caused appellant's horse to suddenly lunge forward and run;
2. There was sudden jolting or bolting by appellant's horse;
3. Appellant's horse had a propensity to bolt and that defendant's guide, Dillon, knew of such propensity;

4. Defendant's guide was under the duty to warn appellant that such horse would run;

for the reason that the evidence in this case is contra. The evidence negatives causal connection between the running of appellant's horse and the running, if any, on the part of the guide's horse. Likewise, there is no evidence that the appellant's horse jolted or bolted (Tr. p. 152); the horse didn't rear or shy (Tr. p. 156). There is no evidence that this horse had a propensity to do anything different from what any other normal horse would do.

STATEMENT OF THE PLEADINGS:

Unfortunately, the record before this Court is not as clear as it should be as to the pleadings under which Appellant claims to have proceeded in this case. As is stated in Appellant's Brief, there was a stipulation by and between counsel as to the theory on which plaintiff would proceed. Appellee's understanding of the stipulation was that plaintiff's case would proceed on the following theory:

1. Whether or not Dillon, defendant's guide, suddenly caused his horse to gallop;
2. If, in fact, Dillon did cause his mount to gallop, whether this caused Plaintiff's mount to bolt, gallop and run; and
3. Whether or not such action on the part of Dillon would be negligence.

While the above is set out in more detail than is the statement in the Appellant's brief, we think there is agreement on this point.

In designating the record, Appellant did not see fit to include therein the proposed amendment to the pleadings which has given rise to Appellant's specification of error designated as Point Seven. Why Appellant elected against incorporating in the record the language of the proposed amendment is something only within his own knowledge, but on this appeal, counsel for Appellee is not willing to agree that the proposed amendment in the words and language employed by Appellant in his brief is identical with the proposed amendment made in the lower court. Nothwithstanding this, reference is made to a blanket objection offered by counsel for Appellee to evidence not in accord with the discussion and stipulation had prior to trial as to the theory on which appellant would proceed. (Tr. p. 30). It is the position of Appellee that any evidence that went in the case other than or different from evidence having to do with the stipulation hereinabove referred to went in over objection.

COURT'S JURISDICTION:

Appellee concedes the jurisdiction of the District Court on the grounds of diversity of citizenship and the amount in controversy exceeding the then statutory sum of $3,000.00. Appellee concedes that the appeal was regularly taken except for the time in which Appellant's brief was filed but on this point Appellee desires to make no issue.

APPELLANT'S POINTS OF ERROR:

Number One — Assumption of Risk. Appellant argues that the lower court should not have given the following instruction on assumption of risk: (Tr. 320)

> "The defendant was not an insurer of the safety of the plaintiff. A person who rides a horse hired for that purpose assumes or takes upon himself the ordinary risks incident to such riding. The plaintiff assumed all risks which he knew or, in the exercise of ordinary care, should have known, were inherent in the trip. But the plaintiff did not assume any additional risks which were proximately caused by the failure of the defendant, if any, either before or at the time of the accident, to exercise ordinary care under the circumstances.
>
> In other words, if the plaintiff's horse suddenly started running, as alleged, it is then a question of whether that running was one of the ordinary risks incident to horseback riding under the circumstances of this case. If you find from the evidence that the running of plaintiff's horse was caused by negilgence of Virgil Dillon, as defined elsewhere in these instructions, then that was not a risk assumed by the plaintiff. If you find from the evidence that plaintiff knew, or, in the exercise of ordinary care, should have known that a suitable saddle horse might start running in that manner, then that was a risk which was assumed by the plaintiff."

The only objection urged by Appellant in the lower court was on the ground that the instruction failed to include a statement that the doctrine of assumed risk is not applicable "if the Plaintiff was not in any way at fault" (Tr. 326-327). On this appeal argument

is now made that there was error in the instruction for the reason that there is no evidence showing that the Plaintiff knew the horse might suddenly run. In the eyes of the Appellee the ground as now asserted is different from that asserted in the lower court, so that Appellant is squarely within the rule that a party may not for the first time on appeal raise an objection different from the objection in the trial court. See Rule 51, Rules of Civil Procedure, as follows:

"Rule 51. Instruction to Jury: Objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

A ground of objection to an instruction given the jury first presented on appeal is not timely made and cannot, therefore, be considered. **Christensen v. Trotter, et al.** (Ariz.) CCA 9th, 171 F 2d 66;**Lang v. Rogney,** (Minn.) CCA 8th, 201 F 2d 88; **Nesbit v. Everette,** (Fla.) CCA 5th, 243 F 2d 59.

If for the sake of argument it can be said that

Appellant's present objection is substantially the same as the objection urged in the lower court, he still gains no relief for the Appellant's own testimony shows that during his youth his father had horses (Tr. 80); that he had ridden horses a few times (Tr. 81); that he rode before he went to the University, and once or twice after starting medical school; that he rode in 1948 or 1949 in the State of Washington (Tr. 81). Appellant could not remember if he had ridden since that time (Tr. 81). Appellant testified that on the trip involved here and prior to the accident, his horse was in the rear (Tr. 88) and that his horse would get behind and then jog to catch up (Tr. 90), and he would just let the horse jog (Tr. 90). Thus the Appellant knew that his horse would follow the other horses and would attempt to keep up with them. While Appellant argues that the record shows he was not an experienced rider, that statement of Appellant applies to the period of his life prior to his reaching his eighth birthday. (Tr. 80) Actually the record before this Court shows that the Appellant, while perhaps not an experienced rider, was acquainted with and had had experience with horses. This experience, together with the knowledge acquired by the Appellant from his riding the horse involved to the lake, without question allows for the application of the doctrine of assumed risk as laid down by the lower court in its instruction to the jury. There is no question but what the doctrine of assumption of risk applies to livery stable

cases and that the instruction given by the Court (Tr. 320) is proper.

In **Fred Harvey Corporation v. Mateas,** (Cal.) CCA 9th (1948) 170 F 2nd 612, the court said, at page 615:

> ". . . . The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by the failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances."

And in **Reynolds v. Kenwood Riding Club** (Ohio) 18 NE 2d, 612, the Court said at page 614:

> "One who rides a horse, which he has hired for that purpose, takes the ordinary risks incident to such pursuit . . . "
>
> "When there is no evidence of any known trait, condition or propensity of the horse, which would subject the rider to greater risks than ordinarily attach to horseback riding, it is error for the trial judge to submit such case to the jury . . ."

See, also, **Clifton v. Holliday** (Ohio) 88 NE 2d 304;
15 ALR 2d, § 10, p. 1323;
Vanigan v. Mueller (Wis.) 1932, 243 NW 419;
Smith v. Pabst (Wis.) 1939, 288 NW 780.

Without the aid or support of any authority whatsoever, Appellant urges that the instruction on assumption of risk was erroneous in that it states that Appellant assumes any risk of which he should have known in the exercise of ordinary care. In this respect, Appellant is arguing directly contrary to the Instruction No. 5 which he proposed. (Tr. 13)

Lastly, Appellant contends that there could be no assumption of risk brought about by Dillon's causing his horse to gallop, but this agrument is clearly and fully covered in the Court's instruction which advised the jury that the Appellant did not assume any additional risk caused by the negligence of the Appellee (Tr. 320). Specifically, the Court instructed the jury that if Appellee's agent, without warning, suddenly and negligently caused Appellant's horse to run, then Appellant did not assume such risk. Indeed it is difficult to see how the lower court could have better presented this matter to the jury.

POINT TWO—BAILMENT
POINT FIVE—IMPLIED WARRANTY

These two points, while argued separately in Appellant's brief, are so closely related that they will in this brief be treated together. A further reason for their being treated together in the Appellee's brief lies in the court's instruction to the effect that counsel for Appellant withdrew from consideration of the jury any theory of negligence in furnishing an unsuitable horse (Tr. p. 316). Also, as is conceded by Appellant in his brief under caption STATEMENT OF THE PLEADINGS, the theory of unsuitability or warranty was abandoned and withdrawn. The Appellant is now squarely faced with the general rule of law applicable as follows:

> "Ordinarily, where an issue is abandoned or expressly withdrawn by the parties, the court should not submit it to the jury, and no instruction should

be given on such issue." (See 88 **C.S.J.—Trial—Section 275, page 737.)**

Thus the record itself disposes of these two points; consequently, it isn't clear to the Appellee why argument is devoted thereto in the Appellant's brief. Because of such argument, however, Appellee does feel that response should be made.

Appellant urges error on the part of the lower court in failing to give plaintiff's proposed instruction No. 2 (Tr. pp. 11 and 12) on the duty of a bailor of animals to warn the bailee of the habits, traits or propensities of the animal.

Under plaintiff's proposed instruction, it could be argued that recovery could be had for any habit which a horse possessed, whether the habit was vicious or not. Actually, it is only for dangerous or vicious habits or traits which the livery stable keeper knew or in the exercise of reasonable care should have known that he can be held liable in the event of injury to a rider. See **O'Brien v. Gateway Stables (Cal.) 231 Pac. 2d. 524,** and **Palmquist v. Mercer (Cal.) 272 Pac. 2d. 26.** To the same effect are the cases cited by Appellant, namely: **Mateas v. Fred Harvey, (Cal.) C.C.A. 9th, 146 Fed. (2) 989—bucking; Hahn v. Rockingham Riding Stables, et al (N.J.) 19 A 2d, 191—tired horse collapsed; and Kersten v. Young (Cal.) 125 Pac. 2d. 501—rearing and falling; Dam v. Lake Aliso Riding School (Cal.) 1935, 48 Pac. 2d. 98—jumping; Conn v. Hunsberger (Pa.) 1909, 73 A 324—runaway).**

In a situation such as here presented, there is no

practical difference in the application of the law of negligence and the law of implied warranty so far as duty imposed upon the defendant is concerned. See **Koser v. Hornback (Idaho) 265 Pac. 2d. 988,** where the court says at page 991:

> ". . . one who lets a horse for hire, although not an insurer of the horse's fitness, is under an obligation, sometimes spoken of as an implied warranty, to furnish an animal which is reasonably safe for the purpose known to be intended, and for a failure to use due care to discover dangerous propensities in such animals, or to disclose them to the hirer, he may be held liable for personal injuries or death resulting from such neglect."

Going on, the court says that the form of action was of no consequence and at page 991 uses the following language:

> ". . . because the courts all agree that the bailor is not an insurer, and that a mere breach of the implied warranty is not alone sufficient ground for recovery. In addition thereto the plaintiff must prove that the keeper had some knowledge, or the facts are such as to charge him with knowledge of the unsuitability of the animal; or negligence in failing to take reasonable precaution to determine its suitablity; or in failing to warn the prospective rider of the facts. So whether the action be ex contractu or ex delicto, the required proof is the same. . ."

Such also is the holding in **Mateas v. Fred Harvey, (Cal) CCA 9th, 146 Fed. 2d. 989.**

The record in this case is void of any evidence of dangerous or vicious propensities of the horse involved. The horse did not shy, jump or veer (Tr. pp. 152 and 156); all it did was run. Certainly the fact

that a horse will run when other horses run does not in itself indicate a dangerous or vicious trait or habit.

See **Troop A Riding Academy v. Miller (Ohio) 189 N.E. 647,** where the court at page 649 says:

> "A horse of ordinary spirit that will not run away under any circumstances would be a rare animal, and to hold that, simply because one did run off on one occasion, a jury would be justified in finding that he was vicious, wild, or prone to run, would enable jurors to find verdict on mere speculation and guesses, instead of evidence."

Another case also disposing of Appellant's argument in this respect is **Clifton v. Holliday (Ohio) 88 N.E. 2d. 304,** where on pages 306 and 307 the court said:

> "Wherever horses are used for riding, there is present a contest of wills, the inclination of the horse and the purpose of the rider. If the latter does not know how to control the normal horse, obviously the horse will have its way. Again, there is no evidence that this particular horse had any characteristic not possessed by riding horses in general, which would prevent normal control of its actions."

POINT THREE—COMMON CARRIER

Appellant alleges error in the failure of the Court to give plaintiff's proposed instruction No. 8 (Tr. p. 15) to the effect that defendant was a common carrier. Without exception, the cases hold that a livery stable keeper is not a common carrier and that he owes only the duty of ordinary care toward his customers.

See **54 CJS, Livery Stable Keepers, Section 16, p. 645:**

"A livery stable keeper is **not a common carrier,** as discussed in Carriers § 534, and is not bound to let his horses to every one who seeks to hire them; nor is he bound to use the utmost care and skill in furnishing a horse, vehicle, harness, and driver to a customer, but his duty in the premises is to use ordinary care and skill . . . " (Emphasis ours)

and

15 ALR 2d. § 2, pp. 1314 and 1315 where it is said:

"He owes a duty to furnish a horse which is reasonably fit and suitable for the purpose for which it is let . . .

An owner is not an insurer of the suitability of the horse he lets, but he must exercise the care of a reasonably prudent man to provide a horse suitable for the purposes contemplated in the hiring . . .

The duty required is that of ordinary care and diligence."

In **Dam v. Lake Aliso Riding School (Cal.) 1936, 48 p. 2d, 98,** affirmed in **57 p. 2d, 1315,** where plaintiff was thrown by defendant's saddle horse, the Court said at page 100:

" . . . The respondent was not a common carrier . . . Ordinary care is the test to be used. Due regard should be given to the selection of the horse, the purpose of its use, and the ability of the bailee to control horses generally if this fact is ascertainable . . . Once a horse passes from the bailor to the bailee, then the bailee controls its movements."

To the same effect: **Fred Harvey Corporation v. Mateas, (Cal.) CCA 9th, 1948, 170 F. 2d, 612; Cooper**

v. Layson Bros. (Ga.) 80 SE 666; Conn v. Hunsberger (Pa.) 73 A. 324; Willis v. Schuster (La.) 28 So. 2d, 518.

The statute, R.C.M. 1947, 8-405, relied upon by the Appellant is merely declaratory of the common law, (Taillon v. Mears, 29 Mont. 161, 74 p. 421), which common law theory has been rejected by all the courts in livery stable cases, supra, because of the lack of control over the horse by the livery stable keeper.

Appellant relies upon the Montana case of **Phillips v. Butte Jockey Club, 46 Mont. 338, 127 P. 1011,** wherein the court rejected the theory of carrier for hire for injuries sustained by an invitee in the grandstand at defendant's racetrack. Also appellant cites **Brown v. Columbia Amusement Co., 91 Mont., 174, 6 P. 2d, 874,** wherein the court held that a merry-go-round operator owed the duty of ordinary care toward minor children invited to ride the machine, rejecting plaintiff's contention, on appeal, that the defendant was a carrier of passengers for hire.

It is clear, the court committed no error on this point.

Point Four—Invitee Relationship. Error is asserted in the Court's failure to give Appellant's proposed instruction No. 9 (Tr. pp. 15 and 16) relating to the duty owed an invitee.

Appellant cites no cases which would support application of the rule where the injury occurred at a place outside and beyond the owner's possession or control. On the basis of research conducted by Ap-

pellee, it is clear that the doctrine is limited to those cases wherein the injury is sustained by reason of defective premises under the control of the party charged. Appellant's citation of authority, 38 **Am. Jur.—Negligence** § 96, p. 754, sustains this view. There it is said:

> " . . . The rule is that an **owner or occupant of lands or buildings,** who directly or impliedly invites others to enter for some purpose of interest or advantage to him, owes to such persons a duty to use ordinary care to have his **premises** in a reasonably safe condition . . . " (Emphasis ours)

In 38 Am. Jur.—Negligence § 94, p. 753, it is said:

> "A person who makes use of a dangerous **place** for his own purposes may be held liable to respond in damages for an injury which results therefrom notwithstanding he cannot control the substance or thing which makes the place dangerous. However, the liability of an **owner or occupant of real estate** in reference to injuries caused by a dangerous or defective condition of the premises depends in general upon his having control of the property. In fact, such liability depends upon control, rather than ownership, of the premises . . . " (Emphasis ours)

The case of **Herbert v. Ziegler (Md.)** 139 A. 2d, 699, sheds no light upon the case at bar for there it clearly appears that the injury occurred on premises under the control and possession of the defendant and was caused by defendant's dog frightening the plaintiff's horse.

In all the Montana cases, the doctrine of invitee has been applied only in those cases when the injury occurred on premises owned or occupied by the de-

fendant. See **Ahlquist vs. Mulvaney Realty Co.** 116 Mont. 6, 152 Pac. 2d 137; **McCulloch v. Horton** 102 Mont. 135, 56 Pac. 2d 1344; **Chichas v. Foley Brothers Grocery Co. et al,** 73 Mont. 575, 236 Pac. 361. Our research has failed to reveal any case which would extend the doctrine as urged on behalf of Appellant in this case, that is, to make the rule applicable for use of a hired chattel for injury happening away from or off the premises, so to speak. Supporting the Appellee's position that the doctrine is not so extended is the case of **Johnston v. De La Guerra Properties,** (Cal.) 170 Pac. 2d 5, where the Court says on Page 9:

> " . . . A tenant ordinarily is not liable for injuries to his invitees occurring outside the leased premises on common passageways over which he has no control. . . . "

The same rule is applied in **Paine v. Hampton Beach Improvement Co.** (N.H.) 100 At. 2d 906; **Stoddard et al v. Roberts Public Markets,** (Cal.) 80 Pac. 2d 519; **Williams v. Wolf** (Pa.) 84 Atl. 2d 215.

While it may be argued that the four cases above cited are not precisely in point with the question here involved, nonetheless the burden here rests upon the appellant and in this he has failed. As stated above, there is a total lack of authority for this position and it must be disregarded.

POINT FIVE—IMPLIED WARRANTY

(See Argument on Pages 9-12)

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POINT SIX—CONTRIBUTORY NEGLIGENCE

Again it is not clear to counsel for Appellee why time and space in argument is devoted to the question of contributory negligence. As the record shows (Tr. p. 316), the issue of contributory negligence was withdrawn from consideration by the jury. This being so, there would be no reason for the court to give plaintiff's proposed instruction No. 4 (Tr. pp. 12 and 13). In fact, the court refused to give an instruction on contributory negligence and Appellant in the lower court made no objection to the court's failure to so instruct. Therefore, Appellant is precluded under Rule 51 of the Federal Rules of Civil Procedure from now asserting this as error. Further argument on this point is deemed unnecessary.

POINT SEVEN—AMENDMENT OF PLEADINGS

As stated by Appelle under caption STATEMENT OF THE PLEADINGS, the court does not have before it the language of the proposed amendment which now gives rise to Appellant's complaint of error. In spite of this, Appellant would seek to have this court set aside the lower court's ruling. This cannot be done in the face of the general rule that all possible presumptions are indulged to sustain the action of the trial court. See **T.V.T. Corporation, et al v. Basiliko, et al., (D.C.) 257 F. 2d. 185,** at page 187, where the court says:

> The difficulty with appellants' position here is that they have not given this court an adequate record

for considering their claims. To quote the Seventh Circuit:

> 'All possible presumptions are indulged to sustain the action of the trial court. It is therefore, elementary that an appellant seeking reversal of an order entered by the trial court must furnish to the appellate court a sufficient record to positively show the alleged error.' In re Chapman Coal Co., 1952, 196 F. 2d. 779, at page 785.

On this appeal, appellants have given us as a record only the pleadings in the instant case, the motions for summary judgment, the judgments entered, and the notice of appeal. Under the circumstances, this is plainly insufficient."

See, also **Whiteley v. Foremost Dairies, Inc. (Ark.) CCA-8, 254 F 2d. 36; Haug v. Grimm (N.D.) CCA-8, 251 F 2d 523; The Elgin Corporation v. The Atlas Building Products Company (N.M.) CCA-10, 251 F. 2d. 7; Complete Auto Transit, Inc. v. Floyd, (Ga.) CCA-5, 249 F 2d. 396.**

Related to the same question and in support of Appellee's position are the following Ninth Circuit cases:

State Farm Mutual Auto Insurance Co. v. Porter, (Cal.) 186 F. 2d. 834; and **Pellegrino v. Nesbit, (Cal.) et al. 203 F. 2d. 463.**

Should the court conclude that from the Appellant's brief it can consider the point now urged appellant's argument nonetheless lacks merit and legal support. From the testimony of the Appellant alone, it is clear that there is no causal connection between the alleged negligent act or omission and the alleged injury.

To summarize, Appellant conclusively established:

1. The horse did not rear or shy (Tr. p. 156);

2. The horse just started to run (Tr. p. 156);

3. Plaintiff remained on the horse, in the saddle with hands on reins and feet in stirrups at all times (Tr. pgs. 154-155);

4. Appellant knew the horse's tendency to close the gap so to speak; (Tr. p. 90);

5. Plaintiff stopped or slowed his horse to take pictures (Tr. pgs. 144-145).

To quote **Reino v. Montana Mineral Land Development Co., 38 Mont. 291, 99 Pac. 853,** at page 854: (Pac. Reporter).

" 'Negligence is the cause of the accident, in a legal sense, only when it is of such a character as that men of ordinary prudence, judgment, and experience ought reasonably in the light of the attending circumstances to have forseen that it was likely to produce such an accident.'

In 1 Thompson's Commentaries on the Law of Negligence, it is said: 'As will more fully appear in the next title, the law does not impute negligence to an injury that could not have been foreseen or reasonably anticipated, as the probable result of a given act or omission. * * * ' Section 28. 'It follows that the negligence of a person cannot be the proximate cause of a harm to another following it, unless, under all the attending circumstances, ordinary prudence would have admonished the person sought to be charged with the negligence that his act or omission would probably result in injury to some one. The general test as to whether negligence is the proximate cause of an accident is therefore said to be whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby.' Section 50."

Under the circumstances as related by the appellant in his own testimony, it cannot be said that the injury, if any, sustained by the appellant was proximately caused by the alleged failure on the part of Dillon to warn plaintiff as to the tendency of plaintiff's mount to follow. Nor can it be said that the situation would have been different if, in fact, a warning was or could have been given,

Generally on the application of Rule 15 (b) of the Federal Rules of Civil Procedure with reference to amendment of pleadings to conform to evidence see: **Macris v. Sociedad Maritima San Nicolas, (N.Y.) CCA 2d 245 F. 2d, 708,** wherein amendment was denied where the evidence adduced at trial showed no breach of duty by the defendant or causal connection between the acts of defendant and plaintiff's injury. Also see **Chesapeake & Ohio Railway Company v. Newman (Ohio) CCA 6th, 243 F. 2d, 804,** where permission to amend an answer to conform to proof of a new defense was denied, in which case the court on pages 812 and 813 said:

> " . . . It is clear that the case was tried without pleading or evidence in support of the proposed new issue. Rule 15, 28 U.S.C.A. Federal Rules of Civil procedure is not applicable under the facts of this case . . ."
>
> "Rule 15(b) of the Federal Rules of Civil Procedure under which appellant sought to amend his answer, clearly is applicable only when as stated, in the rule, the amendment is to 'conform to the evidence.' It is also stated in the rule that the issue or issues sought to be included in the amendment

must have been 'tried by express or implied consent of the parties.' In the instant case the court did not find sufficient evidence which required an amendment so that the pleadings would conform to the evidence . . . The trial court is vested with sound discretion in granting or refusing leave to amend, and under the circumstances in the instant case, we find no abuse of that discretion. Carrol v. Funk, 9 Cir. 222 F. 2d, 508 . . ."

In view of the standing objection made by counsel for appellant, It cannot be said in the instant case that the new issue now asserted by appellant was tried with the express or implied consent of the parties. (Tr. p. 30).

It is respectfully submitted that the appeal be dismissed, and that the judgment of the lower court be affirmed.

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